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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

No. .....

GEORGE McGOWAN,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Mississippi

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INTRODUCTORY STATEMENT

The Petitioner, George McGowan, respectfully petitions for a writ of certiorari to review a judgment and order made by the Supreme Court of Mississippi, unofficially reported as **McGowan v. State**, 258 So.2d 801. A copy of the opinion is appended and marked Appendix A. A copy of the judgment is appended and marked Appendix B.

Rehearing was denied March 20, 1972, without opinion. A copy of the judgment denying rehearing is appended and marked Appendix C.

A copy of an order permitting the petitioner to remain at large on bail pending a determination of this petition is attached and marked Appendix D.

The petitioner was convicted of criminal contempt of the Chancery Court of Jefferson Davis County, Mississippi, after his request for a jury trial was overruled.

The petitioner was sentenced by the trial court to pay a fine of $750.00 and to serve five months in the county jail, and to stand committed until the sentence was served, and the fine was paid. The Mississippi Supreme Court affirmed the conviction and reduced the fine to $500.00.

JURISDICTIONAL STATEMENT

Petitioner believes this Court has jurisdiction to review the decision by writ of certiorari by virtue of 28 U.S.C. § 1257 (3).

QUESTION PRESENTED FOR REVIEW

Did the trial court deny the rights guaranteed to the petitioner by Article 3, § 2, of the Constitution of the United States, and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, by denying petitioner's request for jury trial, in view of the severity of the sentence, and was the denial cured by the action of the appellate court in merely reducing the amount of the fine?

APPLICABLE MISSISSIPPI STATUTES

§ 1152, **Mississippi Code of 1942**, as amended, provides as follows:

> A person ordered by any tribunal, except the Supreme Court, to be punished for a contempt, may appeal to the court to which other cases are appealable from said tribunal, and may supersede any fine imposed by the execution of a bond, payable to the state,

with two sufficient sureties, to be approved by the tribunal appealed from, in a penalty to be fixed by said tribunal, not exceeding three hundred dollars, conditioned to pay the fine and costs, in case of affirmance in whole or in part; and the appellant shall be entitled to bail in such cases upon the execution of an appearance bond, with two or more such sureties, in the penalty of three hundred dollars, payable to the state, conditioned to appear in the court to which his appeal is prosecuted and to abide the result of such an appeal, which may be approved by the sheriff or other officer in whose custody the appellant may be; and on such appeal the question shall be whether the appellant was guilty of contempt; and the sentence or decree or order of the court below may be affirmed, reversed, annulled, or modified, according to the judgment of the appellate court. All such appeals shall be tried on the record, and the presiding officers of all tribunals condemning any person for contempt shall within one day thereafter, sign bills of exception, if demanded showing all the facts and evidence upon which such judgment was predicated.

§1278, **Mississippi Code of 1942**, as amended, provides as follows:

The chancery court, or the chancellor in vacation, or judge granting the writ, shall have power to punish any person for breach of injunction, or any other order, decree, or process of the court, by fine or imprisonment, or both, or the chancellor or judge granting the writ may require bail for the appearance of the party at the next term of the court to answer for the contempt; but such person shall be first cited to appear and answer. And any person so punished by order of the chancellor in vacation, may on five days' notice to the opposite party, apply to a judge of the

Supreme Court, who, for good cause shown, may supersede the punishment until the meeting of the said chancery court.

§2540, **Mississippi Code of 1942**, as amended, provides as follows:

In cases not capital the court shall order the convict to stand committed until the fine, costs, and jail fees be paid.

§2562, **Mississippi Code of 1942**, as amended, provides as follows:

Offenses for which a penalty is not provided elsewhere by statute, and offenses indictable at common law, and for which a statutory penalty is not elsewhere prescribed, shall be punished by fine of not more than five hundred dollars and imprisonment in the county jail not more than six months, or either.

§7899, **Mississippi Code of 1942**, as amended, provides as follows:

Every convict sentenced to imprisonment in the county jail, or to such imprisonment and the payment of a fine, or the payment of a fine, shall be committed to jail, and shall remain in close confinement for the full time specified for imprisonment in the sentence of the court, and in like confinement until the fine, costs and jail fees be fully paid, unless discharged in due course of law, or as hereinafter provided. But no convict shall be held in continuous confinement under a conviction for any one offense for failure to pay fine and costs in such for a period of more than two years.

§7906, **Mississippi Code of 1942**, as amended, provides as follows:

Every county or municipal convict shall be comfortably clothed at the expense of the county or munici-

pality, but all clothing furnished shall remain the property of the county or municipality, and shall be thoroughly fumigated and disinfected before being allotted to a convict after having been used by another, and every convict shall be sufficiently fed, to maintain his body and induce his good health, with substantial and suitable food to be furnished and prepared and paid for by the county or municipality. And every convict for each day's work he is required to do shall receive credit on his fine and costs assessed against him of Three Dollars ($3.00) per day, until such fine and costs are fully paid. And in case the convict is serving a sentence of imprisonment, each day that he works in serving such sentence shall entitle him credit for equal time on his sentence of imprisonment, but in no instance shall a convict receive credit on the fine and costs and on the time sentenced to imprisonment for the same work. No convict shall be allowed to labor more than eight hours per day, but shall be required, when able, to perform eight hours labor each day.

STATEMENT OF THE CASE

The State of Mississippi, acting by and through the District Attorney of the Fifteenth District, and the Sheriff of Jefferson Davis County, filed a bill on February 16, 1971 in the Chancery Court of Jefferson Davis County, to abate a common nuisance and praying that the petitioner's house and lot be abated as a common nuisance. A temporary writ of injunction was issued by the Chancery Court of Jefferson Davis County against the petitioner on February 19, 1971. On March 27, 1971, a consent final decree was entered finding that the petitioner used his house and lot as a place of storage of intoxicating liquors for the purpose of sale and adjudging them, the petitioner, his house and lot, to be a common nuisance. The petitioner

was enjoined and restrained from March 27, 1971 until the March, 1972, term of the Chancery Court of Jefferson Davis County, from having unlawful intoxicating liquor in his possession or under his control on his lot or in his house, and from further operation and use of the premises as a place where intoxicating liquor was kept, possessed, used, sold or given away.

On May 26, 1971, the District Attorney and the Sheriff of Jefferson Davis County, filed a motion for citation for contempt, charging that the petitioner had violated the terms of the consent final decree of March 27, 1971.

On July 2, 1971, the petitioner filed a motion for a jury trial, stating that in the event the petitioner was convicted of contempt, there was no limit by statute or common law to the term of imprisonment or fine which may be imposed and that a sentence in excess of six months imprisonment for criminal contempt was of such severity by itself to take the offense out of the category of "petty" as it relates to the rights of a jury trial. The Chancery Court, after hearing arguments on July 2, 1971, denied the motion for a jury trial.

The case proceeded to trial on July 15, 1971 and, after hearing and considering the evidence, the Chancellor entered a final decree adjudging the petitioner to be guilty of criminal contempt and ordering petitioner to pay the costs and to serve five months in the Jefferson Davis County Jail; to pay a fine of $750.00; and to stand committed until the sentence was served and the fine paid.

An appeal was perfected to the Supreme Court of Mississippi, raising the same Federal Constitutional question raised here. The Supreme Court of Mississippi affirmed petitioner's conviction, but reduced the fine to $500.00, on February 28, 1972 (258 So.2d 801). A petition for rehearing was denied without a written opinion on March 20, 1972. The petitioner has exhausted his state remedies.

REASONS FOR GRANTING THE WRIT

The Mississippi Supreme Court in this case has denied petitioner's personal rights protected by United States Constitution by denying petitioner's request for a jury trial to determine his guilt or innocence.

ARGUMENT

Did the Trial Court Deny the Rights Guaranteed to the Petitioner by Article 3, § 2, of the Constitution of the United States, and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, by Denying Petitioner's Request for Jury Trial, in View of the Severity of the Sentence, and Was the Denial Cured by the Action of the Appellate Court in Merely Reducing the Amount of the Fine?

The petitioner relies on five cases, **Cheff v. Schnackenberg**, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966); **Duncan v. Louisiana**, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968); **Bloom v. Illinois**, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); **Hinton v. State**, 222 So.2d 690 (Miss. 1969); and **Baldwin v. New York**, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970). These cases concern the right of trial by jury, and the extent to which a jury trial is required by subsection 3 of Article 3, §2 of the Constitution of the United States, and the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Subsection 3 of Article 3, §2, provides:

> "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any

State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Fifth Amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, not be deprived of life, liberty, or property be taken for public use, without just compensation."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No states shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In **Cheff v. Schnackenberg**, 384 U.S. 373, 86 S. Ct. 1523, 16 L.Ed.2d 629 (1966), the defendant was found guilty of criminal contempt and was denied a jury trial. He was sentenced to six months imprisonment. A four member majority of this Court held that the defendant was not entitled to a jury trial and the judgment was affirmed. Mr. Justice Harlan filed a concurring opinion. Mr. Justice Stewart joined the concurring opinion in part. Mr. Justice White took no part in the decision and Justices Black and Douglas dissented.

This Court, in **Cheff v. Schnackenberg**, cited 18 U.S.C., § 1, which provides:

> "Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor.
>
> (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

The four member majority stated:

> "• • • in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof. Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries."

The **Cheff** decision apparently left open the question of whether a fine could be imposed which would result in

imprisonment over the six month limitation and left out of its quotation of 18 U.S.C. §1 any reference to the $500 maximum fine, which could be imposed in addition to the six months, and have the offense remain a "petty offense."

On the same day, May 20, 1968, that **Duncan v. Louisiana**, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) was decided, this Court decided **Bloom v. Illinois**, 391 U.S. 194, 88 S.Ct. 1447, 20 L.Ed.2d 522 (1968) case. Bloom was convicted in an Illinois state court of criminal contempt and sentenced to imprisonment for 24 months for willfully petitioning to admit to probate a will falsely prepared and executed after the death of the punative testator. He made a timely demand for jury trial which was refused.

Mr. Justice White delivered the opinion in the **Bloom** case. He was joined by the Chief Justice Warren and Justices Black, Douglas, Brennan and Marshall. Mr. Justice Fortas delivered a concurring opinion and Justices Harlan and Stewart dissented.

This Court held in **Bloom** that "• • • serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial." (391 US 198, 88 S.Ct. 1480).

The Court further held in **Bloom**:

> "It is old law that the guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty offenses. Only today we have reaffirmed that position. **Duncan v. State of Louisiana**, supra, 391 U.S. at 159-162, 88 S.Ct. at 1452-1454, 20 L.Ed. 2d 491. By deciding to treat criminal contempt like other crimes insofar as the right to jury trial is

concerned, we similarly place it under the rule that petty crimes need not be tried to a jury" (391 U.S. 210, 88 S.Ct. 1486).

• • • • • • •

"Under Illinois law no maximum punishment is provided for convictions for criminal contempt. **People v. Stollar**, 31 Ill.2d 154, 201 N.E.2d 97 (1964). In **Duncan** we have said that we need not settle 'the exact location of the line between petty offenses and serious crimes' but that 'a crime punishable by two years in prison is • • • a serious crime and not a petty offense.' 391 U.S. at 161, 162, 88 S.Ct. at 1454. Bloom was sentenced to imprisonment for two years. Our analysis of **Barnett**, supra, and **Cheff v. Schnackenberg**, 387 U.S. 373, 86 S.Ct. 1523, 16 L.Ed. 629, makes it clear that criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved. Under the rule in **Cheff**, when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed as the best evidence of the seriousness of the offense. See **Duncan**, supra, 391 U.S. at 162, n. 35, 88 S.Ct. at 1454. Under this rule it is clear that Bloom was entitled to the right to trial by jury, and it was constitutional error to deny him that right. Accordingly, we reverse and remand for proceedings not inconsistent with this opinion."

The petitioner here contends that when he was fined $750, that took his criminal contempt case out of the "petty" offense category and placed it in the "serious" offense category, requiring a jury trial. The fact that he was sentenced to "only" five months instead of six months does not render the imposition of a $750 fine any less serious. The petitioner here did not move the trial

court to reduce the fine, and there is no authority under Mississippi law for so doing.

The Mississippi Supreme Court has held that § 2562 does not apply to the Chancery Court's power to punish for violation of an injunction prohibiting gambling operations and abating establishments as nuisances, but that an accused could be punished under § 1278, **Mississippi Code of 1942.**

There is a possibility that the imposition of a fine in excess of $90, coupled with a sentence to serve five months, might be excessive, in light of **Baldwin v. New York.** Mr. Justice White delivered the "majority" decision in the **Baldwin** case. He was joined by Justices Brennan and Marshall. Mr. Justice Black concurred in the judgment and filed an opinion in which Mr. Justice Douglas joined, 399 U.S. 74, 90 S.Ct. 1891. Mr. Justice Blackmun took no part in the decision. The Chief Justice dissented and filed an opinion at 399 U.S. 76, 90 S.Ct. 1892. Mr. Justice Harlan filed a dissenting opinion, 399 U.S. 117, 90 S.Ct. 1914, 26 L.Ed.2d 463. Mr. Justice Stewart also filed a dissenting opinion, 399 U.S. 143, 90 S.Ct. 1928, 26 L.Ed.2d 478.

Justices Black and Douglas were of the opinion that the Constitution guarantees a right of trial by jury, whether the offense is petty or serious. The three-justice majority opinion held that "* * * no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized" (399 U.S. 69, 90 S.Ct. 1888).

This Court further held:

> "Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous though they may be, may be

> outweighed by the benefits that result from speedy and inexpensive non-jury adjudications. We cannot, however, conclude that these administrative conveniences, in light of the practices that now exist in every one of the 50 States as well as in the federal courts, can similarly justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment." (399 U.S. 73, 90 S.Ct. 1890)

The trial court determined the guilt or innocence of the petitioner at the same time that the trial court decided whether the offense was a "petty" one or a serious one. The "petty" offender in Mississippi is not entitled to a jury trial and a "petty" offense provides for punishment by fine of not more than five hundred dollars and imprisonment in the county jail not more than six months or either. The trial court found the petitioner guilty of a serious crime, without the protection afforded by a jury. He was convicted of a serious offense.

The Mississippi Supreme Court should have sent this case back for retrial; however, it simply reduced the sentence but that act, which did not diminish the fact that the trial judge had determined by its discretion that the offense was a serious one.

A convict only receives a credit of $3.00 per day toward the payment of a fine until such fine and costs are fully paid. He must also serve the sentence imposed upon him but no convict shall receive credit on the fine and costs and on the time sentenced for the same work. A $750 fine would subject him to an additional 250 days to serve over the five months, and the imposition of the fine of $500 would subject him to serve an additional 167 days over the five months. The sentence plus either fine would exceed a "possible six months' imprisonment."

CONCLUSION

The petitioner respectfully requests this Court that this case be reversed and remanded to the Chancery Court of Jefferson Davis County for a new trial.

Respectfully submitted

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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

GEORGE McGOWAN
v.
STATE OF MISSISSIPPI
No. 46,705

Gillespie, Chief Justice:

George McGowan was enjoined by the Chancery Court of Jefferson Davis County from conducting the unlawful business of keeping and selling intoxicating liquor on certain premises. Miss. Code 1942 Ann., § 2646 (1957). He was cited for contempt of court for violating the injunction and thereupon moved the court to grant a jury trial on the contempt issue. The motion was overruled and the issue was tried before the chancellor, who found McGowan guilty of contempt and imposed a penalty of five months' imprisonment in the county jail and a fine of $750. Miss. Code 1942 Ann., § 1278 (1957).

The sole question presented in this case is whether under the Constitution of the United States, Article III, Section 2, and under the Mississippi Constitution, Article III, Sections 26, 31, the trial court erred in overruling McGowan's motion for a jury trial. Appellant contends that his fine in the amount of $750 takes this criminal contempt case of the petty offense category and places it in the serious offense category, requiring a jury trial.

The United States Supreme Court has enunciated the rule that in determining whether a contempt is to be treated as serious or petty, the court should look to the maximum sentence which could be imposed under a state statute where the maximum penalty has been set thereunder; and where a state statute provides no maximum

punishment, the court should look to the penalty actually imposed as the best evidence of the seriousness of the offense. Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); Duncan v. La., 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); and Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). **Baldwin v. New York**, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970), further clarified the distinction between serious and petty crimes by holding that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized" (26 L.Ed. at 440). In each of these cases, the Supreme Court was considering the constitutional right of an individual to a jury trial in relation to the length of his prison term, rather than the amount of his fine. The United States Supreme Court only made brief mention of fines, and did not consider the question of whether fines are a factor in determining the seriousness of a crime.

We find no case in which the United States Supreme Court has limited the amount of a fine to $500 without a jury trial, where only a fine was imposed for criminal contempt. However, that Court upheld convictions for criminal contempt where a fine in excess of $500 was imposed as a sole punishment. Cheff v. Schnackenberg, *supra*; United States v. United Mine Workers of America, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1946). *Cf.* In Re Jersey City Education Ass'n., 115 N.J.Super. 42, 278 A.2d 206 (1971); Rankin v. Shanker, 295 N.Y.S. 2d 625, 242 N.E. 2d 802 (Ct.App. 1968). We feel that there is an important distinction here which charts a line of demarcation between crimes of serious and petty nature. What is significant is whether, as in the case at bar, there was not only a fine imposed, but also a jail term.

In **Hinton v. State**, 222 So.2d 690 (Miss. 1969), this Court quoted at length from the **Bloom** case, *supra*, and held:

> We conclude that where the confinement is not more than six months and the fine for not more than $500, that the offense is a petty one and the accused is not entitled to a jury trial under the Sixth Amendment to the Constitution of the United States (222 So.2d at 692).

Thus this Court adopted six months' imprisonment and $500 fine as the maximum punishment which may be imposed in this state upon an individual without a jury trial. We did not, nor do we now, consider the situation where only a fine is imposed. However, we do recognize a strong precedent for approving fines exceeding $500 without a jury trial where only a fine is imposed as punishment. Cheff and United Mine Workers, *supra.*

We have read and considered carefully the case of **United States v. R. L. Polk & Co.**, 438 F.2d 377 (6th Cir. 1971), which involved a motion by a corporation to correct a sentence under which it was fined $35,000 for criminal contempt. The corporation contended and the Court so held that the imposition of a fine on a corporation in excess of $500 no longer permitted the offense to be characterized as petty. The Court concluded that the test in determining whether an offense is petty or serious is to look at the objective criteria found in the existing laws of the nation. The Court further stated:

> However, no existing laws of the nation, other than 18 U.S.C. § 1,[1] have been disclosed to us which would provide any other objective standard of what constitutes a "serious" financial penalty to a corporation (438 F.2d at 380).

The rationale of the Court in the **Polk** case is not persuasive on us.

---

[1] 18 U.S.C. § 1 defines a petty offense as "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both. . . ."

This Court recognizes a further distinction between criminal contempt cases such as the one before us where punishment is imposed retrospectively, and those where punishment is imposed prospectively. In the latter, the defendant has the power to avoid the imposition of any fine; and if he chooses to ignore the Court's directions and proceeds or pursues a prohibited course of action, then the imposition of a fine is by his own choosing. This is analogous to appellant's second contention, namely, that where a non-indigent defendant fails to pay a fine and is imprisoned therefor, if his term in prison should exceed six months, he is entitled to a jury trial. In this instance the defendant also has the power to prevent further punishment, and the fact that he chooses not to pay the fine should not inure to his benefit so as to entitle him to a jury trial.

"The only relief sought by the defendant on this appeal is the remand of the case for resentencing. However Mississippi Code 1942 Annotated, section 1152 (1957) governs the scope of review on appeals from convictions for contempt and provides in part as follows:

> [A]nd on such appeal the question shall be whether the appellant was guilty of contempt; and the sentence or decree or order of the court below may be affirmed, reversed, annulled, or modified, according to the judgment of the appellate court.

Ordinarily sentencing is a matter for the trial court, but in view of the foregoing provisions of the statute, the decree in this case is modified, thus reducing the fine by $250. The conviction is therefore affirmed with punishment fixed at imprisonment in the county jail for five months and a fine of $500."

AFFIRMED AS MODIFIED.

JONES, BRADY, INZER AND ROBERTSON, JJ., CONCUR.

APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, FEBRUARY 28, 1972 Court Sitting : : : : :

George McGowan
46,705 v.
State

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Jefferson Davis County and this Court having sufficiently examined and considered the same and being of the opinion that this cause should be affirmed as modified doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 15th day of July 1971—be and the same is hereby affirmed with punishment fixed at imprisonment in the county jail for five months and a fine of $500.00. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellant and Glynn Rogers, Mrs. Glynn Rogers and Ruby Johnson, sureties on the appeal bond herein, all of the costs of this appeal to be taxed for which let proper process issue.

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APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, MARCH 20, 1972 Court Sitting : : : : : : : :

George McGowan

46,705 v.

State

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

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APPENDIX D

IN THE SUPREME COURT OF MISSISSIPPI

MONDAY, APRIL 3, 1972, COURT SITTING : : : : : : :

George McGowan

#46,705 vs.

State of Miss.

ORDERED: The appellant, George McGowan, is permitted to remain at large on the same $2,000.00 bond, approved by the Sheriff of Jefferson Davis County, Mississippi, previously filed with the Clerk of this Court, pending a determination of his petition for certiorari, provided he files his petition for certiorari in the United States Supreme Court within 90 days from February 28, 1972.

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In the Supreme Court of the United States

OCTOBER TERM

No. _____

GEORGE McGOWAN,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi (Petitioner's Appendix "A") is reported as *McGowan* v. *State*, 258 So.2d 801 (Miss. 1972).

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does the right to trial by jury extend to a case wherein the defendant is sentenced to a five-month term of imprisonment and is fined Five Hundred Dollars ($500.00)?

STATEMENT OF FACTS

On March 27, 1971, in the Chancery Court of Jefferson Davis County, Mississippi, the Petitioner and his premises were found to be a common nuisance in that Petitioner was keeping and selling intoxicating liquor. Petitioner was enjoined from having unlawful intoxicating liquor on his premises as provided by §2646, Mississippi Code of 1942, Annotated (1956). Petitioner was then cited for contempt of court for violating the injunction and thereupon moved the court to grant a jury trial on the contempt issue. A motion for a jury trial was overruled and the issue was tried before the Chancery Judge who found the Petitioner guilty of contempt and imposed a penalty of five months imprisonment in the County jail and a fine of Seven Hundred Fifty Dollars ($750.00). Petitioner appealed his conviction to the Supreme Court of Mississippi wherein his conviction was affirmed with the sentence being reduced to five months imprisonment in the County jail and a fine of Five Hundred Dollars ($500.00).

Petitioner now seeks to have this Court grant Certiorari in order to determine whether he could receive a five-months jail sentence and a Five Hundred Dollar ($500.00) fine without having been tried by a jury.

ARGUMENT

The Petitioner Had No Constitutional Right to a Trial by Jury on His Contempt Citation Wherein He Was Ultimately Sentenced to Serve a Term of Five Months in the County Jail and Was Ordered to Pay a Five Hundred Dollar Fine.

Of primary concern in this case is the determination of what crime should be considered a "petty" crime and what crime should be considered a "serious" crime for purposes of deciding whether or not a defendant is entitled to a trial by jury. The cases cited by the petitioner are the principal cases wherein this Court has considered the question in recent years. These questions taken chronologically form a basic outline of the attempt of the courts to form a fair and objective standard by which the right of a person or corporation to a jury trial may be determined. At the same time, these decisions have also examined the peculiar nature of criminal contempt in this regard.

In the case of *Cheff* v. *Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966), the Court first held that sentences exceeding six months may not be imposed by federal courts in the absence of a jury trial. It should be noted that this was decided on the grounds of the supervisory power of the court (see *Cheff, supra*, 384 U.S. at 380, 16 L.Ed.2d at 634, and the separate concurring Opinion of Mr. Justice Harlan, 384 U.S. at 381, 382, 16 L.Ed.2d at 634, 635) and not on constitutional grounds. The Court held:

> "According to 18 U.S.C. §1 (1964 ed.), '[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months' is a 'petty of-

fense.' Since Cheff received a sentence of six months imprisonment (see District of Columbia v. Clawans, supra, 300 U.S. at 627-628, 81 L.Ed. at 847, 848), and since the nature of criminal contempt, an offense sui generis, does not, of itself, warrant treatment otherwise (cf. District of Columbia v. Colts, supra), Cheff's offense can be treated only as 'petty' in the eyes of the statute and our prior decisions."

Two years later in *Duncan* v. *Louisiana*, 391 U.S. 145, 48 S.Ct. 1444, 20 L.Ed.2d 491 (1968), this Court held that where a state statute provided that the appellant could be sentenced to a period of two years for the crime of simple battery, that it was a "serious" crime and that the appellant was entitled to a jury trial as a matter of constitutional right under the Sixth and Fourteenth Amendments.

The Court, however, did not attempt to define "petty" and serious offenses to any greater degree than to say that an offense which carries a sentence of six months or less is a petty offense and that a crime punishable by a sentence of two years in prison is a "serious" one. In that case this Court stated:

> "We need not, however, settle in this case the exact location of the line between petty offense and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense."
>
> (391 U.S. 145 at 161, 20 L.Ed.2d 491 at 503)

In *Duncan, supra*, the Court again distinguished its treatment of criminal contempt where no statutory maximum sentence is prescribed from other crimes with maximum sentences fixed by statute. In Note 35, 391 U.S. 145 at 162, 20 L.Ed.2d 491 at 503, the Court explains:

"It is argued that Cheff v. Schnackenberg, 384 U.S. 373, 16 L.Ed.2d 629, 86 S.Ct. 1523 (1966), interpreted the Sixth Amendment as meaning that to the extent that the length of punishment is a relevant criterion in distinguishing between serious crimes and petty offenses, the critical factor is not the length of sentence authorized but the length of the penalty actually imposed. In our view that case does not reach the situation where a legislative judgment as to the seriousness of the crime is imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question. Cheff involved criminal contempt, an offense applied to a wide range of conduct including conduct not so serious as to require a jury trial absent a long sentence. In addition, criminal contempt is unique in that legislative bodies frequently authorize punishment without stating the extent of the punishment which can be imposed. The contempt statute under which Cheff was prosecuted, 18 U.S.C. §401, treated the extent of punishment as a matter to be determined by the forum court. It is therefore understandable that this Court in Cheff seized upon the penalty actually imposed as the best evidence of the seriousness of the offense for which Cheff was tried."

It should be noted that an important distinction is made in the test applied to determine the "seriousness" of a crime where the legislature has set a maximum penalty by statute, and where the legislature has seen fit to leave the penalty entirely to the courts. In *Duncan, supra*, the court looked to the maximum sentence that could be imposed where the maximum penalty had been set by statute. (See also: *Frank* v. *United States*, 395 U.S. 147, 148, 23 L.Ed.2d 162, 165, 89 S.Ct. 1503 (1969); *District of Columbia* v. *Clawans*, 380 U.S. at 628, 81 L.Ed. at 848). In

Bloom v. *Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), decided the same day as *Duncan*, *supra*, this Court looked to the penalty actually imposed as the best guide in absence of a statutory maximum sentence following the rule in *Cheff*, *supra*.

The Supreme Court of Mississippi in the case of *Hinton* v. *State*, 222 So.2d 690 (Miss. 1969), adopted the reasoning of *Bloom*, *supra*, in that the punishment imposed should be looked to in determining whether the offense is petty or serious and that ". . . where the confinement is not more than six months and the fine not more than $500.00, that the offense is a petty one and the accused not entitled to a jury trial under the Sixth Amendment to the Constitution of the United States." *Bloom* v. *Illinois*, *supra*.

Subsequent to the holding of this Court in *Cheff*, *Duncan* and *Bloom*, this Court has further defined a "serious" crime in *Baldwin* v. *New York*, 399 U.S. 66, 26 L.Ed.2d 437, 90 S.Ct. 1886 (1970). Whereas, in *Duncan*, *supra*, the Court had held that a potential statutory sentence of two years made the crime a serious one, the Court in *Baldwin*, *supra*, held a "serious" crime to be one with a potential sentence of over six months, stating that ". . . no offense can be deemed 'petty' for the purpose of the right to trial by jury where imprisonment for more than six months is authorized." (399 U.S. 66 at 69, 26 L.Ed.2d 437 at 440).

Subsequent to these decisions the present state of the law was clearly rationalized and explained by the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Snyder*, 275 A.2d 312 (Pa. 1971). That case is very similar to the one at bar. The defendant appealed on an order of the lower court imposing sentences for two contempts, each of which was for less than six months. Like Mississippi, Pennsylvania has no statutorily estab-

lished maximum sentence for criminal contempt in the respective areas with which these cases are concerned. The lucid discussion of the present law applying to the situation as stated by the Supreme Court of Pennsylvania is as follows:

"Since the contempt conviction occurred on October 2, 1970, we must determine appellant's right to jury trial in light of the decision of the Supreme Court of the United States, especially in Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (June 22, 1970). The decision of the United States Supreme Court in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, and Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522, clearly established that a defendant was entitled to a jury trial for a serious offense. However, there was much confusion as to what constituted a serious offense as distinguished from a petty offense. This confusion was laid to rest in Baldwin v. New York, 399 U.S., page 68, 90 S.Ct. page 1800, supra, in which the court said: '. . . we have concluded that no offense can be deemed "petty" for purposes of the right to trial by jury where imprisonment for more than six months is authorized."

"Pennsylvania does not have a statutorily established maximum sentence for direct criminal contempts and therefore we must look to the length of the sentence which the court actually imposed to test for 'seriousness'. Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, supra. In this case, each of the two sentences which were imposed for the two separate direct criminal contempts was less than the 'more than six months' standard which was established as the cut-off point between 'petty' and 'serious' crimes. Therefore, Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886,

supra, in no way required appellant to be given a jury trial on either of said contempt charges."

Baldwin, supra, has apparently left the rule of *Bloom, supra,* intact; that where no maximum penalty is prescribed by statute the punishment actually imposed will be looked to in the determination of whether the crime falls into the category of "petty" or "serious." (See: *Commonwealth* v. *Fletcher,* 269 A.2d 727 (Pa. 1970)).

In the present case the petitioner was convicted for a violation of an injunction prohibiting the sale of liquor under the authority of Section 2646, Mississippi Code 1942 Annotated (1956), which does not provide a penalty for violation of the injunction. The Supreme Court of Mississippi has held this violation to be criminal contempt, *Church* v. *State,* 239 Miss. 1, 111 So.2d 228 (1959), with authority to punish derived by the chancery courts of this State through Section 1278, Mississippi Code of 1942 Annotated (1956). *Murphy* v. *State,* 202 Miss. 890, 32 So.2d 875 (1948). That statute sets no maximum penalty for contempt. There being no statutory maximum penalty in Mississippi in reference to criminal contempt of the nature for which petitioner was found guilty, the rule of *Bloom* and *Hinton, supra,* should be applied and the penalty actually imposed by the sentencing court will be looked to in determining whether or not the crime is serious or petty.

Applying this rule to the sentence received by the petitioner, the five months sentence given in the present case is less than the six months maximum sentence set for petty offenses in *Hinton* and *Baldwin, supra,* therefore, the crime is a "petty" one and the petitioner is not entitled to a jury trial because of the length of his sentence.

The petitioner, however, goes one step further contending that the $750.00 fine imposed by the lower court or even a $500.00 fine subjects an individual to a "possible" sentence of greater than six months as defined in *Baldwin*. The petitioner was ordered to stand committed until his fine was paid in accordance with Section 2540 and Section 7899, Mississippi Code of 1942 Annotated (1956). The petitioner, admittedly not an indigent, reasons that should he refuse to pay his fine he would be required to remain in jail and receive credit toward the payment of his fine in the amount of $3.00 per day under Section 7906, Mississippi Code 1942 Annotated (1956). A $750.00 fine would thus subject him to an additional 250 days in jail, or a $500.00 fine would subject him to an additional 167 days in jail. This contention of the petitioner is unsupported by reason or by decisions of the courts. Historically, a fine which might result in an additional sentence has not been considered as having any bearing on the question of the length of the prison sentence for purposes of determining the right to trial by jury (See *Ex parte Wilson*, 114 U.S. 417, 428, 55 S. Ct. 253, 29 L.Ed. 89, *People* v. *Bellinger*, 269 N.W. 265, 271 199 N.E. 215, *Matter of McKinley* v. *Hamilton*, 282 N.Y. 393, 397, 26 N.E.2d 949, 951; 127 ALR 1283.)

Commitment of the convicted defendant to jail until his fine is paid is no part of the punishment for his offense. The penalty or the punishment adjudged is the fine, and the custody adjudged is the mode of executing the sentence, that is of enforcing the payment of his fine. 21 Am. Jur. 2d, *Criminal Law*, §603, page 557 (See: *Anderson* v. *Shackelford*, 74 Fla. 36, 76 So. 343; *Ex parte Bryant*, 24 Fla. 278, 4 So. 854).

Imprisonment for failure to pay a fine does not arise from the crime committed by the appellant, but from his

entirely separate and distinct refusal to obey the decree of the sentencing court. Any refusal to pay by the appellant is an act of disobedience consisting solely in refusing to do what has been ordered and not in doing what has been prohibited by the Court. That the appellant stand committed until paying his fine is not intended as punishment but as a method of forcing him to obey the order of the court. As was ably put by the Court in *Gompers* v. *Buck's Stove and Range Company*, 221 U.S. 418 at 441; 55 L.Ed. 797 at 806, 31 S.Ct. 492 (1911), the petitioner ". . . carries the keys of his prison in his own pocket. He can end the sentence and discharge himself at any moment by doing what he had previously refused to do."

As previously stated, the petitioner is not an indigent and would be imprisoned in excess of five months only because of his refusal to obey an order of the court and pay his fine. The courts have held in recent years that an indigent may not be imprisoned beyond a maximum term specified by statute solely because of his failure to pay a fine and court costs; however, as stated in *Morris* v. *Schoonfield*, 399 U.S. 508, 90 S.Ct. 2232, 26 L.Ed.2d 773, 774 (1970), these cases do ". . . not mean that a state cannot jail a person who has the means to pay a fine but refuses or neglects to do so."

The petitioner contends the maximum fine which may be imposed in the trial of the crime without a jury is limited to $500.00, and that the imposition of the $750.00 fine is sufficient to take a crime out of the category "petty" crime and make it a "serious" crime which would require a jury trial.

As previously stated, fines have historically not been a determining factor in considering the seriousness of a crime. The issue is what bearing the recent decisions of

the courts, beginning with *Cheff, supra*, have had on the role of a fine in determining the seriousness of an offense.

The recent decisions of this Court on the determination of the seriousness of a crime have made only brief mentions of fines, and none of these cases have considered fines as a factor in making the determination. In fact, the Court, beginning with *Cheff, supra*, and going down through *Baldwin, supra*, have avoided including the question of fines in determining the line between petty and serious crimes.

In *Cheff, supra*, no mention was made of a crime in determining the seriousness of a crime. The decision of the six months limitation in federal cases was based on 18 U.S.C., §1, part of which provides:

> "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500.00, or both, is a petty offense."

Until the decision in *Cheff, supra*, this statute had not been regarded as a maximum limit for determination of a petty offense in regard to the length of imprisonment or the amount of fine, but rather as a minimum standard for determining a serious offense. A petty offense could still be greater than that provided in 18 U.S.C., §1. When *Cheff, supra*, set the maximum limit of a petty offense at six months imprisonment along the lines of 18 U.S.C., §1, it made no mention whatsoever of that portion of the statute dealing with fines.

At the same time, the Court in *Cheff, supra*, did not mention the fact that Cheff had been charged with contempt of court along with Holland Furnace Company, which was fined $100,000.00. Although Cheff was granted a petition for certiorari, for a determination of whether

his six months imprisonment without a jury trial was a violation of the constitutional right, the petition of the Holland Company, of which he was formerly President and a Chairman of the Board, was denied at *Holland Furnace Co.* v. *Schnackenberg*, 381 U.S. 924, 14 L.Ed.2d 683, 85 S.Ct. 1559 (1965). Thus, the $100,000.00 fine given the corporation apparently was not considered by the Court to be of the nature requiring review for purposes of determining the right to a jury trial.

In the case of *Duncan* v. *Louisiana*, *supra*, in holding the Sixth Amendment right to a jury trial applicable to the states, the Court refused to follow the guidelines of 18 U.S.C., §1, regarding even the six month limitation which it had upheld under the supervisory powers of the court regarding the federal system. There was no mention whatsoever of the fine except in a one sentence reference to the 18 U.S.C., §1, definition of petty offense. Likewise, in the case of *Bloom*, *supra*, where the Court held the Sixth Amendment right to a jury trial applicable to serious contempts, there was no mention made of the fine.

In the case of *Baldwin*, *supra*, where the Court held that there is a Sixth Amendment right to a trial by jury for any offense where the authorized punishment is over six months, the question of fines is examined only in regard to the 18 U.S.C., §1, definition of petty offense in the federal system and there was no holding by the Court that the amount of a fine can take the crime out of the category of "petty" and place it in the "serious" category.

In case of a prison sentence, there is little variance in the harshness of penalty from place to place and over a period of time as applied to an individual. However, there is a great variance in the financial situation of different individuals depending on class, education and geographical location which might render a set fine inconsequential

in impact for some and not for others. In addition, the great fluctuation and monetary value over a period of time makes an additional factor of instability. It is not difficult to understand that the Courts have refused to consider the amount of a fine in the determination of whether an offense is petty or serious for purposes of the right to trial by jury.

In the case of *In re Duehrer*, 236 A.2d 592 (N.J. 1967), the Supreme Court of New Jersey considered the question in the determination of the "outer limits of punishment with respect to offenses below the grade of crime" and found that "the amount of the fine presents no problem."

This question was also considered by the New York Supreme Court in the case of *Rankin* v. *Shanker*, 23 N.Y.2d 111, 295 N.Y.S.2d 625, 242 N.E.2d 802 (Ct. App. 1968), wherein an individual and a union were found guilty of contempt of court in violating a temporary injunction against a strike. In considering the fine imposed on the union, the Court made the following statement:

> "Nor does the penalty to which defendant unions are subject—a fine of $10,000.00, a day or 1/52 of the total amount of annual membership dues, 'whichever is the lesser' (Judiciary Law §751, subd. 2, par. [a])—render the contempt a 'serious' crime. The determination of whether it is serious or petty under the decision, turns not on the amount of the fine which may be imposed but solely on the length of the prison sentence . . . Consequently, as the cases reveal, the fine, even though sizeable in amount, furnishes no valid criterion for the defendant's claim that the contempt charged against them constitutes a serious crime. Further, even if the amount of the permissible fine had any

relevance, the fine—which in the last analysis must be borne by the union membership (See e.g. Martin v. Curran, 303 N.Y. 276, 281, 101 N.E.2d 683, 686)—is actually small, amounting, at most, to no more than a member's weekly union dues for each day of the contempt." See also: *In re Jersey City Education Association*, 278 A.2d 206 (N.J. 1971).

However, in *Cheff, supra*, wherein this Court held that through its supervisory powers over the federal courts a sentence exceeding six months might not be imposed by federal courts absent a jury or waiver thereof, this Court stated:

> "Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries."
>
> (384 U.S. 373 at 380, 16 L.Ed.2d 629 at 634)

The Supreme Court of Mississippi, in considering the petitioner's appeal reduced the petitioner's sentence of five months imprisonment and $750.00 fine to a five month sentence and a $500.00 fine. Such sentence was well within the boundaries of 18 U.S.C., §1, which defined a petty offense as any offense wherein the penalty does not exceed imprisonment for a period of six months or a fine of not more than $500.00 or both. And, in such cases, an individual has no guaranteed right to a trial by jury.

Therefore, the respondent respectfully submits the petitioner was afforded every constitutional right and the Petition for Writ of Certiorari now before this Court should be denied.

CONCLUSION

The sentence received by the petitioner on his conviction of contempt of court was well within the boundaries of a petty offense, and in such cases there is no vested right to a trial by jury.

Respectfully submitted,

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